

THEORIES OF DISCRIMINATION/BURDENS OF PROOF

THEORIES OF DISCRIMINATION

1. Disparate Treatment

- a. Individual discrimination
- b. Less favored treatment based on protected group status

2. Disparate Impact

- a. Policy or practice neutral on its face which has a disproportionate negative impact upon a protected group
- b. Most often in a class action or pattern and practice suit

3. Accommodation

- a. Religious
- b. Handicap
- c. Failure to accommodate the religious beliefs of employees and applicants and disabilities for the handicapped is discriminatory in some circumstances

4. Sexual Harassment

- a. Hostile and intimidating work environment
- b. Quid pro quo sexual favors requested in exchange for a job benefit

BURDENS OF PROOF

1. Disparate Treatment

- a. Burden always with complainant to prove intentional discrimination by the preponderance of the evidence (50+%)
- b. First step is to establish an inference of discrimination by establishing a prima facie case through:
 - 1) direct evidence
 - 2) indirect evidence/comparison of treatment by protected group
 - 3) historical treatment of protected group

- c. If prima facie case established, then employer must articulate a legitimate, nondiscriminatory reason for its actions
 - 1) burden of production not proof or persuasion
 - 2) reason must be sufficiently specific to allow complainant an opportunity that they are not true or believable
- d. Complainant can still prevail by demonstrating pretext--that is that the employer's articulated reason is not true or worthy of belief but is merely a pretext for discrimination

2. Disparate Impact

- a. Complainant must show statistically that a neutral policy or practice has a negative impact upon his protected group
- b. Once disparate impact has been identified, the burden shifts to the employer to prove that there is a business necessity reason to use it; this is a difficult burden to overcome

3. Accommodation

- a. Religion
 - 1) complainant must have a sincere belief
 - 2) burden rests primarily on complainant to demonstrate how accommodation can be achieved
 - 3) employer can overcome the accommodation requirement by showing undue hardship
 - 4) accommodation does not have to be made at the expense of other employees
- b. Handicap
 - 1) Must be a qualified handicapped person (e.g., able to perform the essential Functions of the positions with or without accommodation)
 - 2) Employee must demonstrate why accommodation is not possible
 - 3) The standard by which the employer is evaluated is that of reasonableness; such factors as costs, content of the position in question, etc.; reasonableness is determined on a case-by-case basis

4. Sexual Harassment

Complainant must show

- 1) That they have been subjected to a hostile work environment, OR
- 2) That they have been subjected to unwanted sexual advances as a term or condition of employment